83-1824

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No._____

KENNETH LANGE MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Is Illinois v. Andreas, _____ U.S. _____, 103 S.Ct. 3319 (1983), applicable to non-controlled delivery search and seizure cases?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, KENNETH LANGE MARTIN, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 28, 1983.

CITATION TO OPINION BELOW

On November 2, 1982, the United States

Court of Appeals for the Ninth Circuit reversed the Appellant's conviction. United States v. Martin, 693 F.2d 77 (1982). On rehearing, the same Court affirmed the Appellant's conviction in a published Order. United States v. Martin, 721 F.2d 266 (1983). The Opinion and the Order appear in the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 2, 1982. The Government's Petition for Rehearing was granted and the Appellant's conviction was affirmed on November 28, 1983. This Petition for Certiorari was filed within sixty (60) days of that date, in accordance with Rule 20.1 of the Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

FACTS.

On June 4, 1981, at approximately 8:00 a.m., Drug Enforcement Administration (DEA) agent, Laura Garcia, (hereinafter "Garcia"), who was acting in an undercover capacity, received a telephone call from Petitioner, Kenneth Lange Martin, (hereinafter "Martin"). (R 16). Martin and Garcia arranged a meeting for later in the day at Martin's house, at which time Martin would sell eight ounces of cocaine to Garcia. (R 17).

Garcia arrived at Martin's house at approximately 2:05 p.m. The two drank beer while Martin played pool. (R 26). After they had waited for approximately twenty minutes, Garcia suggested to Martin that he call the person who was supposed to deliver the cocaine. (R 17). Martin made the call

and shortly thereafter a woman arrived. Martin and the woman went into the master bedroom while Garcia waited in the family room. (R 17-18). The woman then left and Garcia entered the master bedroom. (R 19).

In the bedroom, Garcia observed Martin pick up a large manila envelope from the top of a desk and then remove a plastic bag containing a white powdery substance. Martin then weighed the substance (scales were on the desk) and placed the powder back into the plastic bag, placed the plastic bag into the manila envelope, and placed the manila envelope into a bank bag. He then locked the bank bag and placed it into the lower left drawer of the desk. (R 19-20).

Martin stated at the suppression hearing that Garcia was only shown the plastic bag of cocaine as it was laying on the desk and she then left the room. (R 110). Garcia stated that she observed

Martin weigh the cocaine, repackage it, and place it in the desk drawer. (R 20).

Garcia then told Martin that she had to phone her friend to bring the money for the purchase. She then made the telephone call which was actually a signal for the back-up officers to move in. (R 20-21). Garcia went out to the front yard of the residence, then re-entered the residence with other officers and arrested Martin. (R 21-23).

Garcia then removed the bank bag from the desk drawer. (R 11). Although Martin's key chain was taken from him after his arrest, he refused to tell the officers which key fit the bank bag. (R 90). Garcia did finally open the bag and examined the contents. (R 11). She did not have a search warrant. (R 49). Although Garcia waited ten minutes for Martin to sign a purported consent to search before she opened the bag (R 35,39), the prosecutor wisely

waived the consent argument in trying to justify the search. (R 13,34).

PROCEDURE.

Martin was charged in a three count indictment on June 10, 1981. Count I charged conspiracy to distribute cocaine, a Schedule II narcotic drug controlled substance in violation of Sec. 841(a)(1) and 846 of Title 21, United States Code. Count II charged Martin with possession with intent to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of Sec. 841(a)(1) of Title 21, United States Code. Martin was charged in Count III of the indictment with distribution of cocaine, a Schedule II narcotic drug controlled substance, in violation of Sec. 841(a)(1) of Title 21, United States Code. All three counts pertained to the same quantity of cocaine, eight ounces, which was retrieved from Martin's residence on

June 4, 1981.

On July 14, 1981, Martin filed a Motion to Suppress the cocaine seized from his residence on June 4, 1981, for the reason that said seizure was violative of his Fourth Amendment rights pursuant to the United States Constitution. The Motion was heard and testimony taken on September 18th and 21st, 1981. Said Motion to Suppress was denied on September 21, 1981.

On November 3, 1981, Martin and the Government submitted to the Court for trial a stipulated set of facts for decision by the Court. On the same date, Martin was found "not guilty" of Counts I and III, but "guilty" of Count II, possession with intent to distribute cocaine. On December 7, 1981, Martin was sentenced on Count II to three (3) years imprisonment and a fine in the amount of Five Thousand Dollars ($5,000.00). On December 10, 1981, Appellant filed a timely Notice of Appeal.

On November 2, 1982, the United States Court of Appeals for the Ninth Circuit reversed Martin's conviction on the basis of the warrantless search of the bank bag by Garcia.

On December 16, 1982, the Government filed a Petition for Rehearing with the United States Court of Appeals for the Ninth Circuit. The Petition stated that a case with similar facts (Illinois v. Andreas), was pending in the United States Supreme Court and its holding would be helpful in the rehearing of the Martin case in the Ninth Circuit.

On July 5, 1983, the United States Supreme Court decided Illinois v. Andreas, _____ U.S. _____, 103 S.Ct. 3319, 77 L.Ed. 2d 1003 (1983). Thereafter, on November 28, 1983, the United States Court of Appeals for the Ninth Circuit affirmed the convictions in a two sentence Order:

> "The government's petition for rehearing is allowed.

> Based on the authority of Illinois v. Andreas, ____ U.S.____, 103 S.Ct. 3319 (1983), the judgment is affirmed."

United States v. Martin, 721 F.2d 266 (9th Cir., 1983.)

REASONS FOR GRANTING CERTIORARI

ANDREAS APPLIES ONLY TO CONTROLLED-DELIVERY SEARCHES.

The Ninth Circuit originally reversed Petitioner Martin's conviction because the evidence seized was obtained under a warrantless search in violation of United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). United States v. Martin, 693 F.2d 77, 78 (1982). The Martin Court also noted that another Ninth Circuit case with very similar facts emphasized that the "box containing contraband seized under the plain view doctrine was opened and searched only after the police had obtained a warrant". Id., cit-

ing United States v. Blalock, 578 F.2d 245, (CA9, 1978).

When the Ninth Circuit considered the applicability of Illinois v. Andreas, ____ U.S. ____, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983), during the Martin rehearing, the panel determined that Andreas was controlling and affirmed Martin's conviction. Martin , supra, at 78.

The Ninth Circuit was incorrect in its ruling on rehearing because the language of Andreas clearly limits its applicability to controlled-delivery searches only. The Chief Justice's first paragraph in Andreas states that the question presented is whether a search warrant is necessary to search a container after a controlled delivery. Andreas, supra, 103 S.Ct., at 3321. This Court, in Andreas, after detailing the facts of the controlled delivery, then stated the purposes of controlled deliveries and described how they are executed. Id.,

at 3321-3323. All in all, this Court devoted considerable attention to analyzing controlled deliveries.

This Court's reasoning in Andreas is further evidence of that decision's narrow applicability. This Court explained in Andreas that:

> "No protected privacy interest remains in contraband in a container once government officers have opened that container and identified its contents as illegal."

Id. at 3323 (emphasis added). This reasoning clearly applies only to controlled deliveries. Controlled delivery searches are unique in that the police (by chemically testing the substance during the first search) know exactly what is in the container before they make the second search.

In Andreas, a Customs Inspector at the O'Hare airport in Chicago opened a large metal box and found a table inside. Concealed within the table was a substance the Customs Inspector thought to be marijuana. A DEA agent responded and chemically tested

the substance to ensure that it was marijuana. Id. at 3321. Since the DEA agent knew what was in the container after the first search, this Court held that he was not required to obtain a warrant to open the container after the second seizure. Id. at 3324.

Even the dissenters in Andreas, although disagreeing with the Court's holding, acknowledged that the case applied only to controlled delivery searches:

> ". . . the Court's rationale, even though limited to a very specific fact pattern, is nevertheless astounding in its implications [that the second search in a controlled delivery is not a search].

Id. at 3325 (Justices Brennan and Marshall dissenting.

Because the issue, facts, reasoning and holding of Andreas dealt solely with controlled deliveries, the Ninth Circuit erred in applying Andreas to a warrantless search conducted after an undercover buy.

Allowing the Ninth Circuit to expand

the Andreas doctrine from the carefully orchestrated controlled delivery situation to include any undercover buy would eviscerate the Fourth Amendment. Whenever undercover police officers or their informants observed something they believed contained an illicit drug, they could later seize what they though to be the same container and the plain-view exception would swallow the warrant requirement.

The Ninth Circuit decided this federal question in a way which conflicts with the Andreas decision. Therefore, Petitioner respectfully requests this Court to review the Judgment of the Court of Appeals.

EVEN IF ANDREAS APPLIED TO NON-CONTROLLED DELIVERY CASES, THE FACTUAL DIFFERENCES BETWEEN THE INSTANT CASE AND ANDREAS RENDER ANDREAS INAPPLICABLE.

The Andreas Court stated that in a controlled delivery case if there was "a substantial likelihood that the contents have been changed" then a warrant would be necessary.

The test to determine whether there is a substantial likelihood that the contents have been changed is also stated in the Opinion:

> ". . . it is possible that the container will be put to other uses--for example, the contraband may be removed or other items may be placed inside. The likelihood that this will happen depends on all of the facts and circumstances, including the nature and uses of the container, the length of the break in surveillance, and the setting in which the events occur."

Id. at 3324.

The first criteria the Court used was the "nature and uses of the container". Id. In Andreas, the container was a large, locked metal box big enough to hold a table, characterized by the Court as having an unusual size and specialized purpose. Id. at 3325. In the instant case, however, the container was a common bank bag which anyone can purchase for a small sum in any bank in the country. The size of the bank bag makes it ideal for carrying just about any small item. In contrast with the large,

metal container in Andreas, the bank bag has neither an unusual size nor a specialized purpose.

The second factor of the "substantial likelihood" test is the "length of the break in surveillance". Although the period of time in which the Andreas container was out of the police view was longer than in the instant case, the contents of the bank bag could be exchanged or another bank bag substituted much more easily than the large metal box in Andreas. Therefore, under the "gap in surveillance" prong of the test, it is more likely that the contents of the container were switched in this case than in Andreas.

The final segment of the test is "the setting in which the events occurred". Id. at 3324. In Andreas, the defendant was arrested after receiving a shipment of marijuana that he had apparently shipped to himself. Id. at 3321. There is no evidence

that Andreas had any reason to substitute the contents of the metal box or the metal box itself after he received it.

In the instant case, though, Garcia left the house after Martin re-packaged the cocaine. In light of the common practices of narcotic traffickers, it would not have been unusual for Martin to have substituted some other substance for the cocaine while Garcia was out of the room, thereby keeping both the money and the cocaine. A swindled narcotics purchaser is not likely to report such a fraud to the police.

Martin has thus prevailed under the three part test, which demonstrates a substantial likelihood that some other substance could have been in the bank bag at the time of the second search. Therefore, the Andreas exception to the search warrant requirement was not applicable and the original Ninth Circuit decision should be reinstated.

Another important factual difference between Andreas and the instant case is the officer's knowledge of what the substance is before the second search. The Supreme Court in Andreas stated that "[N]o protected privacy interest remains in contraband in a container once Government officials lawfully have opened that container and identified its contents as illegal". Id. at 3323 (emphasis added). The Court went on to state that "once a container has been found to a certainty to contain illicit drugs, the contraband becomes like objects physically within the plain view of the police, and the claim to privacy is lost. Id. at 3324 (emphasis added).

In the Andreas case, the contraband was chemically tested by a DEA agent after he was notified of the contraband by a Customs Officer and before the controlled delivery was consummated. Id. at 3321. The DEA agent in Andreas thus had satisfied the cer-

tainty" test; he knew that the substance involved in the controlled delivery was contraband because he had tested it. Furthermore, in United States v. Ramsey, 431 U.S. 606, 610, 97 S.Ct. 1972 (1977); United States v. Edwards, 602 F.2d 458, 461 (1st Cir., 1979); and McConnell v. State, 595 P.2d 147, 149 (Alaska 1979); (all controlled delivery cases cited in Andreas), the contraband was chemically tested during the initial search so that when the contraband was seized after the delivery, the police officers were certain that contraband was in the containers and a search warrant was unnecessary. However, in the instant case, there was no such test or even an initial inspection of the substance. At the Motion to Suppress, Agent Garcia testified that she had merely observed (from an unknown distance) the Appellant allegedly handling a white powdery substance. (R 19). In fact, this substance could have been many things other than

cocaine. There are numerous federal cases dealing with counterfeit drug "rip-offs" occurring when supposed drug dealers sell to buyers what is purported to be an illicit drug, but what is actually a non-narcotic substance. United States v. Everett, 700 F.2d 900 (3rd Cir., 1983); United States v. Quijada, 588 F.2d 1253 (9th Cir., 1978); United States v. Hough, 561 F.2d 594 (5th Cir., 1977); United States v. Korn, 557 F.2d 1089 (5th Cir., 1977); United States v. Binetti, 552 F.2d 1141 (5th Cir., 1977); United States v. Oviedo, 525 F.2d 881 (5th Cir., 1976); State v. Daugherty, 502 F.2d 1019 (5th Cir., 1974); United States v. Sudduth, 458 F.2d 1222 (10th Cir., 1972). At the Motion to Suppress, the District Court Judge recognized that Garcia couldn't have been sure that the substance she had viewed was cocaine. He referred to the substance she observed as "what was represented to her to be cocaine". (R 187-188).

Because Garcia did not know to a certainty what substance was in the bag, the Government cannot rely on the narrow controlled delivery provisions of Andreas to salvage a search which has already been found to be defective.

CONCLUSION

The Petitioner has shown that the United States Court of Appeals for the Ninth Circuit decided a federal search and seizure question in conflict with this Court's recent Andreas decision. Therefore, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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Attorney for Petitioner
KENNETH LANGE MARTIN

AFFIDAVIT

STATE OF ARIZONA)
: ss.
County of Maricopa)

WILLIAM J. FRIEDL, being first duly sworn upon his oath, deposes and says:

That he is the attorney for Petitioner Kenneth Lange Martin, and is a member of the Bar of the United States Supreme Court, duly admitted on October 20, 1975. That to his knowledge forty (40) copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed first class, postage pre-paid, properly addressed on Thursday, January 26, 1984, which is within the sixty (60) day limitation of Supreme Court Rule 20.

Wm. J. Friedl
William J. Friedl

SUBSCRIBED AND SWORN to before me, the undersigned Notary Public, this 26th day of January, 1984, by William J. Friedl.

Margaret [illegible]
My Commission Expires: 4/2/85

CERTIFICATE OF SERVICE

I, WILLIAM J. FRIEDL, do hereby certify that I have this day served this Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit by mailing three (3) copies thereof to counsel of record in envelopes properly addressed as follows:

A. MELVIN McDONALD, UNITED STATES ATTORNEY, DISTRICT OF ARIZONA
Susan A. Ehrlich, Chief, Appellate Section
Gloria Y. Ybarra, Assistant U.S. Attorney
4000 United States Courthouse
230 North First Avenue
Phoenix, Arizona 85025

SOLICITOR GENERAL
Department of Justice
Washington D.C. 20530

this 26th day of January, 1984.

Wm. J. Friedl

William J. Friedl

A P P E N D I X

UNITED STATES of America, Appellee,

v.

Kenneth Lange MARTIN, Appellant.

No. 81-1758.

United States Court of Appeals
Ninth Circuit

Argued and Submitted July 8, 1982

Decided Nov. 2, 1982.

William J. Friedl, Phoenix, Ariz., for appellant.

Gloria Ybarra, Asst. U.S. Atty., Phoenix, Ariz., for appellee.

Appeal from the United States District Court for the District of Arizona.

Before GOODWIN and NELSON, Circuit Judges, and MARHSALL,* District Judge.

PER CURIAM.

Martin appeals his conviction of possession with intent to distribute cocaine. The only issue on appeal is

*The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

whether the district court erred when it denied Martin's motion to suppress contraband seized at his home without a warrant.

Laura L. Garcia, an undercover DEA agent, came to Martin's house at his invitation posing as a buyer of contraband. She watched Martin weigh the cocaine, place it in a plastic bag, place the plastic bag inside a manila envelope, place the envelope in a bank bag, zip the bank bag shut, lock the bank bag, and put it in the bottom left-hand drawer of a desk in Martin's bedroom.[1] Garcia then went outside to meet another agent (allegedly her "girlfriend" with the money). When Garcia returned, she arrested Martin in the hallway. He was taken into the living room and placed in a chair. Garcia then went back into the bedroom at the end of the hallway, opened the bottom left-hand desk drawer, and retrieved

[1]Although Martin disputes Garcia's observance of these activities, the district court's resolution of the conflict in the testimony is not clearly erroneous.

the locked bank bag. The key was obtained from Martin and used to open the bag. Garcia then took the bag to the police station.

Warrantless searches are per se unreasonable under the Fourth Amendment, subject only to a few specifically established exceptions. The burden is on the government to prove that the departure from the warrant requirement was justified. United States v. Gardner, 627 F.2d 906, 909 (9th Cir. 1980); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973). The district court relied on the "plain view" exception in denying the motion to suppress.

Even assuming, arguendo, that the seizure of the closed bank bag from Martin's desk drawer was legal, a question which we do not need to decide, the subsequent search of its contents required a warrant under the Fourth Amendment. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977). No exigent circum-

stances existed. The bag was in police custody; its contents were not subject to removal or destruction by Martin or by Martin's confederates. Under these circumstances, the Fourth Amendment requires that a neutral magistrate make the decision to open the bag. Officer Garcia herself admitted that nothing prevented the police from obtaining the required warrant.

The cases upon which the government relies, United States v. Johnson, 561 F.2d 832 (D.C.Cir. 1977), and United States v. Ortiz, 603 F.2d 76 (9th Cir. 1979), do not discuss the warrantless opening of a closed container in police custody. In United States v. Blalock, 578 F.2d 245 (9th Cir. 1978), we emphasized that a box containing contraband seized under the plain view doctrine was opened and searched only after the police had obtained a warrant. No exigent circumstances justify a departure from that procedure in the case at bar.

Because the evidence should have been suppressed for this reason alone, we need not reach the question whether the bank bag was in plain view at the time it was seized from Martin's desk drawer.

Reversed.

GOODWIN, Circuit Judge, dissenting.

Martin packed the bag in front of Garcia without any expectation of privacy. Accordingly, I would not extend Chadwick to the facts of this case.

Chadwick has its roots in the privacy values of the person and of the person's possession. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Chadwick does not require a mechanical formality. The invasion of privacy in Chadwick was the unwarranted opening of luggage that had been packed in privacy. In our case, Martin had displayed his merchandise to his customer (who turned out to be a police officer) and he had also

allowed his supposed customer to watch him pack. Martin retained no expectation of privacy in his merchandise as far as Garcia was concerned. When it developed that Garcia was not a customer but a police officer, Martin's faith in Garcia turned out to have been misplaced, but no privacy had been invaded. See Lewis v. United States, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966).

It is argued that the time element, some ten to twenty minutes, extinguishes "plain view" and restores to the drawer and its contents some element of privacy that must not be violated without a warrant. I would agree on the perishable nature of plain view as an abstract proposition. After the passage of some significant amount of time following a view, a new expectation of privacy again might be reasonable, but this is not such a case. Here we have essentially a unitary transaction. The

officer came, she saw, she went out to get "the money" which turned out to be reinforcements, and she returned and retrieved what she had just seen. This transaction invaded no privacy that Martin had not voluntarily relinquished when he dealt with Garcia.

I would affirm.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Kenneth Lange MARTIN,

Defendant-Appellant.

No. 81-1758.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted July 8, 1982

Decided Nov. 28, 1983.

Appeal from the United States District Court for the District of Arizona; Earl H. Carroll, District Judge, Presiding.

Before GOODWIN and NELSON, Circuit Judges, and MARSHALL*, District Judge.

ORDER

The government's petitioner for rehearing is allowed.

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*The Honorable Consuelo B. Marshall, United States District Judge for the Central District of California, sitting by designation.

Based on the authority of Illinois v. Andreas, _____ U.S._____, 103 S.Ct., 3319, 77 L.Ed.2d 1003 (1983), the judgment is affirmed.